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IN THE

Supreme Court of the United States

NO. 234—OCTOBER TERM, 1961

MARIE BENZ,

Petitioner,

against

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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We oppose the granting of the petition because we maintain that the decision of the New York Court of Appeals (9 N. Y. 2d 486, 174 N. E. 2d 727) rests on a non-Federal ground adequate to support it, and because the alleged Federal question not only lacks substantiality but was not raised properly or in due time.

(1)

The decision in the Court below was based on the sovereign immunity of the State of New York to a suit in equity (*Psaty* v. *Duryea*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584 [1954]) and the derivative immunity of the respondent as an instrumentality of the State engaged in a purely governmental function (*Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 [1956]).

These are matters of State law, which are adequate to support the determination of the State courts and which

are not subject to review by this Court. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution.

A suit against a State by one of its own citizens, the State not having consented to be sued, is unknown to, and forbidden by, the law as much as suits against a State by citizens of another state of the Union or by citizens or subjects of foreign states (*Fitts* v. *McGhee*, 172 U. S. 524 [1899]; see also *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273 [1906]; *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299 [1952]).

When the alleged basis of waiver of the immunity recognized by the Eleventh Amendment is a state statute, as is the case here, the question to be answered is whether the state has intended to waive its immunity (*Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U. S. 275, 278 [1959], revg. 254 F. 2d 857 [8th Cir., 1958]). The best and only competent Court which may answer this question is the state Court. This Court accepts the state Court's interpretation of state law (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 [1944]; *Chicago, etc., R. Co.* v. *Risty*, 276 U. S. 567, 570 [1928]; *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448 [1921]).

We have not yet reached the stage where it can properly be asserted that the Fourteenth Amendment of the Federal Constitution has resulted in the repeal of the Eleventh Amendment. Since the non-Federal ground (sovereign immunity) was the basis of the adjudication by the Court of Appeals and since, as demonstrated, it is an adequate basis for the adjudication, this Court should deny the petitioner's request for review (*Wood* v. *Chesborough*, 228 U. S. 672, 676-680 [1913]; *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-520 [1906];

Chicago, B. & Q. R. Co. v. *Illinois ex rel. Comrs.*, 200 U. S. 561, 580-581 [1906]).

(2)

It is clear also that the alleged Federal question lacks substantiality. The petitioner seeks to reform or rescind an agreement of adjustment under which the respondent agreed to compensate her for the taking of part of her land under the power of eminent domain. The agreement was entered into in lieu of a judgment of the State Court of Claims (which would have ensued upon the prosecution of a claim in that Court) and was entered into pursuant to statutory authorization.

The essence of the petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation for her claim. But the substantiality of her claim of violation of due process under the Federal Constitution is no greater in the case of an agreement than it would be in the case of an award. This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present any substantial Federal question (*Appleby* v. *Buffalo*, 221 U. S. 524, 531-533 [1911]).

(3)

It is equally clear from the record that the Federal question, if any, was neither properly raised nor raised in due time.

This is not an action to recover damages by reason of an uncompensated taking in eminent domain. The action is one to rescind or reform an agreement. It is true that the predicate for the agreement was an appropriation of the lands of the petitioner, but the taking, as such, is not the subject of the instant cause of action.

In the Supreme Court, Erie County, the Court of first instance, the only questions presented to and passed upon by the Court were the questions of sovereign immunity of the State and the derivative immunity of the respondent as an instrumentality of the State engaged in a purely governmental function to an action in equity. The Court of first instance held adversely to the petitioner upon both questions. No constitutional question was raised by the petitioner, nor was such question considered by the Court.

Upon appeal to the Appellate Division of the Supreme Court, the same questions were presented; the latter Court affirmed the lower Court without opinion.

Thereafter, on appeal to the Court of Appeals, the petitioner for the first time raised the point that "The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation."

It is a requisite of the jurisdiction of the Court of Appeals to review a constitutional question that it shall have been properly raised for decision in the courts below. (*Delaney* v. *Brett*, 51 N. Y. 78 [1872]; *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 56 N. E. 508 [1900], dism. 185 U. S. 148 [1902]; *Matter of Andersen*, 178 N. Y. 416, 70 N. E. 921 [1904]; *Nod-Away Co.* v. *Carroll*, 240 N. Y. 252, 148 N. E. 512 [1925]; *Matter of Yeannelis* v. *Menides*, 259 N. Y. 513, 182 N. E. 159 [1932]; *City of New Rochelle* v. *Closter*, 296 N. Y. 506, 68 N. E. 2d 451 [1946]; *Matter of O'Neil* v. *Board of Regents*, 298 N. Y. 777, 83 N. E. 2d 469 [1948]; *Rector, etc., of Church of Holy Trinity* v. *Melish*, 301 N. Y. 679, 95 N. E. 2d 43 [1950]). Accordingly, neither the prevailing nor the dissenting opinions of the Court of Appeals in the case at bar gave even the slightest consideration to the belatedly raised constitutional question. Both are concerned only with the question of the status of the re

spondent as a governmental instrumentality of the State and the question of immunity to the suit at bar.

Under circumstances such as these, this Court has refused to review the determination of a lower court and has consistently dismissed writs of error or appeals. (See *Hulbert* v. *Chicago*, 202 U. S. 275 [1906]; *Brown* v. *Massachusetts*, 144 U. S. 573, 580 [1892]; *Edelman* v. *California*, 344 U. S. 357 [1953]; *Erie R. Co.* v. *Purdy*, 185 U. S. 148 [1902]; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 309 [1903].) Where, as in the *McGrew* case, *supra*, and as in the case at bar, the highest State court is completely silent on the Federal question, it has been assumed by this Court, in the absence of affirmative evidence in the record to the contrary, that the silence was due to procedural deficiency (*Bailey* v. *Anderson*, 326 U. S. 203, 206-207 [1945]).

This Court has stated that it undoubtedly rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and that state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law (*John* v. *Paullin*, 231 U. S. 583, 585 [1913]).

Incidentally, it affirmatively appears from the record herein that the Federal question has never been properly raised—even in the Court of Appeals. The petitioner has sought to supply this deficiency by adding Appendix A to her brief herein. Therein she supplies a copy of the report at 9 N. Y. 2d 486, which includes an outline of the points which counsel for the petitioner made in his brief. It is only here that it appears that an *attempt* was made to raise the Federal question. But this Court has held that briefs and oral arguments before state courts are not part

of the record filed with this Court and cannot be used to establish the fact that a Federal question was raised (*Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354, 357-358 [1926]; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 [1934]).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, August 7, 1961.

Respectfully submitted,

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MARIE BENZ, 320 East Main Street,
Hamburg, New York,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
119 Washington Avenue, Albany, New York,

Respondent.

SUPPLEMENTARY REPLY BRIEF

LAUREN D. RACHLIN,
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710 Erie County Bank Building,
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Respondent.

SUPPLEMENTARY REPLY BRIEF

Petitioner in support of her prayer for the issuance of a writ of certiorari makes the following supplementary points in reply to respondent's opposition brief.

(1)

The respondent contends that the decision in the Court below was based on sovereign immunity and as such is a non-federal ground which is adequate for a denial of petitioner's application. Such an argument begs the question which is presented upon this application for certiorari. In the presence of a violation of the Fourteenth Amendment (and the allegations of fraud set forth in petitioner's complaint, which must be taken as true for all purposes

of this proceeding, constitute such a violation) the question is whether the doctrine of sovereign immunity or the federally guaranteed right of just compensation is superior. Thus, any holding in favor of the former must necessarily include a decision against the latter. Therefore, the Court of Appeals could not have decided this question without at the same time passing upon the federal question by implication. Where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, the jurisdiction of the Supreme Court is plain. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157.

(2)

The opposition brief, in point (2) claims that a private agreement as to compensation is equivalent to a court determination of the same and then cites *Appleby v. Buffalo*, 221 U. S. 524, 531-533, 1911 to support a statement that as long as any provision is made for compensation, no matter how small the amount may be, no substantial federal right can be violated and hence no substantial federal question is raised.

Although a valid agreement might be the same as a court judgment, petitioner contends that there was no valid agreement, but only a fraudulently induced, and therefore invalid, one.

Moreover, in the *Appleby* case, *supra*, the New York Court of Appeals had expressly considered the facts of the case and determined that the owner was not entitled to more than the nominal damages that had been awarded by a board of commissioners. Since credible evidence to that effect had been introduced (unlike the instant case),

the Court held that the petitioner had received a proper hearing during which he excepted to no errors of law and therefore he could not complain that his compensation was not just. This is far different from saying that any compensation is "just" compensation. The distinction between that case and the instant one is transparent. There has been no claim or evidence that the value of petitioner's land is as low as the amount specified in the contract. In fact, since this appeal arises out of a motion to dismiss, it must be conceded that its value was the amount alleged, *viz.* twenty times the amount in the contract. Considering this point and the lack of any review of the amount in the contract, the inapplicability of *Appleby, supra*, becomes evident.

(3)

Petitioner has properly raised and preserved the Constitutional question since the commencement of the case. Respondent, on page 4 of its opposition brief, contends that the federal question was never raised in the New York Supreme Court nor in the Appellate Division. Thereafter it goes on to add that, "* * * on appeal to the Court of Appeals, the petitioner for the first time raised the point that 'The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.' "

That these are patent misstatements of the true facts is easily shown. Relevant excerpts from petitioner's brief in the Court of first instance and her brief in the Appellate Division, copies of which are and have been in respondent's possession, clearly indicate that petitioner has relied on the Constitutional argument since the inception of the case. These excerpts are attached hereto as Appendices A and B.

Furthermore, the respondent's own Reply Memorandum in the Court of first instance contained as its Point VI, "PLAINTIFF'S ARGUMENT THAT DENIAL OF JURISDICTION WOULD CONSTITUTE AN UNCONSTITUTIONAL DEPRIVATION OF PROPERTY IS WITHOUT MERIT." Therefore, respondent's claim on this point is utterly groundless and without any basis in fact.

Respondent goes on to add that briefs and oral arguments are not acceptable to show the federal question since only the record can be considered. What respondent overlooks is that this action never reached the trial stage and thus there can be no record (of proceedings) as such. Rather it has proceeded through the appellate levels as a result of the granting of a motion to dismiss made after the summons and complaint were served. All court proceedings, therefore, have been by way of brief and oral argument. Petitioner raised the federal question in the only way open to her, *viz.* by raising the point in her answering brief in opposition to the respondent's motion to dismiss in the Court of first instance.

Therefore, petitioner has supplied the Court with a copy of the official report of this case at 9 N. Y. 2d 486 (as Appendix A of her original Petition for Certiorari) which lists the Constitutional argument as one of the points which petitioner raised in the Court of Appeals. Petitioner also submits excerpts from her briefs in all the other Courts, as Appendices A and B hereof, to show that the point was also raised in the Court of first instance and the Appellate Division respectively. The cases cited by respondent which hold that briefs and oral arguments may not be considered all reached the trial stage and contain records of the full trial proceedings. There were no such proceedings in this case.

As stated in petitioner's original petition, the lack of reference in the state Court's decision to the federal question does not prevent it from being considered by this Court if it was properly raised and if the decision there necessarily, even though not expressly, involved an adverse determination of the point. A motion to amend the remittitur to show that the federal question was raised and necessarily passed upon, has been made in the Court of Appeals by the petitioner and is presently pending in that Court. Regardless of any action taken by the New York Court of Appeals, however, the United States Supreme Court has the power to assert jurisdiction in this case. *Rogers v. Alabama*, 192 U. S. 226, 230-1.

CONCLUSION

For the reasons stated above and in the original petition, a writ of certiorari should be granted.

Dated: Buffalo, New York, September 1, 1961.

Respectfully submitted,

LAUREN D. RACHLIN,
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Buffalo 2, New York.

APPENDIX A

Excerpt From Petitioner's Brief in Special Term of Supreme Court, Erie County

POINT IV

The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.

The plaintiff has alleged in her complaint, which must be taken as true for the purposes of this motion, that the contract as entered into between the plaintiff and the defendant is not the contract which was agreed upon by them, and that the price stated in the agreement is one-twentieth of the true value. *Locke v. Pembroke, supra*, page 6.

The plaintiff, by reason of the fraud of the defendant or the mutual mistake of plaintiff and defendant, is now barred from receiving just compensation for her property. It is the very essence of the equitable jurisdiction of the courts to rectify this situation. If the court fails to act, the plaintiff has no remedy. As the Supreme Court stated in *United States v. Lee, supra*, page 8, referring to the Fifth Amendment, at page 181:

> "If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, which reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?"

This applies to the States by virtue of the Fourteenth Amendment.

APPENDIX B

Excerpt From Petitioner's Brief in the Appellate Division

POINT IV

The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.

The plaintiff has alleged in her complaint, which must be taken as true for the purposes of this motion, that the contract as entered into between the plaintiff and the defendant is not the contract which was agreed upon by them, and that the price stated in the agreement is one-twentieth of the true value. *Locke v. Pembroke*, 280 N. Y. 430.

The plaintiff, by reason of the fraud of the defendant or the mutual mistake of plaintiff and defendant, is now barred from receiving just compensation for her property. It is the very essence of the equitable jurisdiction of the courts to rectify this situation. If the court fails to act, the plaintiff has no remedy. As the Supreme Court stated in *United States v. Lee*, 106 U. S. 196, 218, referring to the Fifth Amendment:

> "If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hand of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?"

This applies to the States by virtue of the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 266, 241. * * *